UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Stockton, CA)

H.J. HEINZ COMPANY

Employer-Petitioner

and Case 32-UC-412

CANNERY WAREHOUSEMEN,
FOOD PROCESSORS, DRIVERS
and HELPERS UNION NO. 601,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Union

DECISION AND ORDER

H.J. Heinz Company, herein called the Employer, is engaged in the processing and manufacturing of food products with an office and place of business in Stockton, California. Cannery Warehousemen, Food Processors, Drivers and Helpers Union No. 601, International Brotherhood of Teamsters, AFL-CIO, herein called the Union, has represented a collective bargaining unit of the Employer's production and maintenance employees at its Stockton facilities for many years. The Employer filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act seeking to have the bargaining unit clarified to exclude employees Richard Castellanos and Hilda Arellano on the basis that they are agricultural employees within the meaning of the Act. A hearing officer of the Board held a hearing in this matter.[1]

[1] The parties filed post-hearing briefs.

After the presentation of the evidence at the hearing, the parties continued to disagree regarding whether Castellanos and Arellano should continue to be included in the historical bargaining unit. As discussed below, I have concluded that the unit should not be clarified to exclude these two employees. To provide a context for my discussion of the issues, I will first give an overview of the Employer's operations and then will discuss the work performed by Castellanos and Arellano. Finally, I will present the facts and reasoning that support my conclusions in this matter.

The Employer's Operations

At its Stockton facilities, the Employer is engaged in the manufacture of tomato products, the research and development of new varieties of tomato seeds, as well as the processing and packaging of bulk seeds that are produced overseas. Although most functions of all three operations are performed in different areas of the same facility in Stockton, the three functions operationally fall into two departments. The agricultural research and development as well as the bulk seed processing are now part of the agricultural research and seed department, which is usually referred to as the seed department.[2] The other department is the tomato products manufacturing department, which is usually called the factory.

The Employer has operated a tomato processing plant of one type or another for decades at its Stockton location. For many years, the Employer operation a fresh tomato processing plant at its Stockton location. Sometime in 2002, the Employer closed its fresh tomato processing operation and since that time has manufactured only tomato products, primarily ketchup, from ingredients processed elsewhere. For decades, the

[2] Up until about 2002, the bulk seed processing was operationally not a part of what was then the Agricultural Research Department.

employees employed in the employer's production operations have been represented by the Union. The Employer and the Union are parties to a collective bargaining agreement, herein called the Agreement, which is effective by its terms from July 8, 2003 to June 30, 2006.

The Employers agricultural research and development operation is based at its Stockton facility where it operates, among other things, greenhouses, a research lab and a short process kitchen. All operations but the greenhouses are housed in the same building as the factory. In addition, as part of its research operation, the Employer operates an 80 acre experimental farm, which is located at about 15 miles east of the Employer's Stockton facilities. The purpose of the research operation is to develop and test new varieties of tomato seed for market. In 2002, the Union sought to represent the employees employed by the Employer at its farm, greenhouses and other research facilities, but the 15 individuals employed in these operations at that time were determined to be agricultural employees.[3]

Once a commercially viable strain of seed is developed by the agricultural research department, the seed is sent overseas for bulk production. The Employer sends the new "parent" seed to contractors in China, India and Thailand. The contractors own and/or operate farms where the seed is planted, pollinated, tomatoes harvested and the seed extracted. The contractors then send the seed in 10,000 lb. containers to the Employer's Stockton facility. During the bulk production, the Employer maintains ownership of the parent seed as well as the bulk seed. The Employer does not own the farms on which the bulk seed is produced but does send an inspector to the growing areas once a year. The Employer only pays the contractors for seed that meets the contractual

[3] Agricultural Research Department (Heinz U.S.A..), 32-RC-4967.

quality standards but the contractor cannot sell the non-conforming seed to anyone else. If the Employer rejects a load of seed, it will either pay a discounted rate for the seed or order the seed to be destroyed.

Bulk seed that is delivered to the Employer's Stockton facility is processed in the seed room by seed room employees. The seed room is located in the same building as the factory and the research labs but in a different area. In the seed room, the bulk seed is first sorted by variety and then washed in an acid bath to sanitize the seed by killing bacteria and funguses. The seed is then dried in gas powered dryers. After the drying, samples of the seed are taken and sent to an onsite lab for testing. Also, at this time, the seed count per unit of seed is calculated but not by seed room employees. Next, the seed is milled in a machine that sizes the seed by diameter. Once the seed is milled, it is packaged in 50 pound bags and stored in an area of the seed room. As orders for the seed arrive, the seed room employees put the orders together for shipping from the bagged seed stored in the seed room.

The Seed Room Employees

Since September 1, 2005, the Employer has employed two full-time seed room employees: Richard Castellanos and Hilda Arellano.[4]

Richard Castellanos

Richard Castellanos has worked for the Employer at its Stockton facilities since 1969. He has always held a bargaining unit position even though the specific job he performed has varied over time. He has worked in both the factory and the seed room. In 1984, he bid for and won a full time, year around job in the seed department and has

[4] In addition, since October 2005, a third employee, John Machado, who holds a full time position in the factory, has been working in the seed room one day a week plus overtime for an average of 20 hours a week. The Employer does not contend that Machado is an agricultural employee.

held that position ever since. However, from 1984 until 2002, he also worked in the factory during the tomato harvest season as well as on some weekends as overtime. After the Employer closed its fresh tomato processing operation sometime during 2002, Castellanos' seasonal work in the factory ended but he continued to work overtime in the factory on weekends until about July 2005. He currently only performs work in the seed room. He has always performed all the functions of the seed room employees, that is, sorting, washing and drying, milling and packaging bulk seed. Castellanos has never been engaged in the planting, breeding or harvesting of seed and has never worked on the Employer's research farm, its greenhouses or its research labs.

In August 2005, the Employer offered and Castellanos accepted a salaried position as a "supervisor/manager" in the seed room but his duties did not change. A short while later, Castellanos rescinded his acceptance of the position. It is undisputed that despite Castellanos short term acceptance of a "supervisor/manger" position, he has continued to perform the same seed room duties that he has performed for decades.

Hilda Arellano

Hilda Arellano began working for the Employer in the factory in 1989 on a seasonal basis. She worked in the seed room for the first time in 1996 on a seasonal basis but became full-time in the seed room in 1998. From 1998 until 2002, Arellano also worked overtime in the factory on weekends. In 2002, she bid for and obtained a factory job, which she held until September 1, 2005. On or about September 1, 2005, Arellano accepted a salaried position as a "supervisor' in the seed room. However, since September 1, she has continued to perform the same seed processing work that she

performed when working in the seed room as a unit employee, i.e., sorting, washing and drying, milling and packaging bulk seed.

Grievance Arbitration

On or about September 1, 2005, upon learning of the Employer's removal of Castellanos and Arellano from the bargaining unit as salaried agricultural employees, the Union filed a grievance seeking to have the two returned to the bargaining unit. The grievance was arbitrated on October 19, 2005 and a decision issued the same date sustaining the grievance and ordering the two employees to be returned to the bargaining unit and made whole. During the arbitration hearing, the Employer argued, among other things, that Castellanos and Arellano had been rightly removed from the unit as agricultural employees. [5]

ANALYSIS

The Applicable Law[6]

Section 2(3) of the Act excludes from the definition of "employee", "any individual employed as an agricultural laborer." Since 1947, Congress has added an annual rider to the Board's appropriation measure directing the Board to apply the

[5] The Union contends that I should defer to contractual arbitrations process under the Agreement, which has already determined that the positions in questions in this matter are not agricultural. However, the Board will generally not defer matters of unit composition to the contractual grievance arbitration procedure. *Magna Corp*., 262 NLRB 104, 105 fn. 2 (1982).

[6] Under certain circumstances, despite the existence of an unexpired collective bargaining agreement, the Board has found it appropriate to entertain a petition for unit clarification. One such circumstance is where a collective bargaining agreement specifically excludes a statutory classification such as supervisors or agricultural workers, and there is a dispute as to the status of certain classifications of employees based on these exclusions. *The Washington Post Co.*, 254 NLRB 168, 168-170, fn. 10 (1981)*Western Colorado Power Co.,* 190 NLRB 564 (1971); *San Jose Mercury and San Jose News*, 197 NLRB 213 (1972). In the instant case, as note above, the Agreement specifically excludes agricultural workers and there is a current dispute regarding the classification of two employees. Thus, a unit clarification petition is timely and appropriate regarding the status of Castellanos and Arellano to determine whether they are agricultural workers and should, therefore, be excluded from the unit. Moreover, even if the petition was determined to be untimely because it was filed during an existing collective bargaining agreement, the petition should not be dismissed on this basis alone because, as discussed infra, there are substantive reasons as well to dismiss the petition. *Bethlehem Steel Corp*., 329 NLRB 243 (1999).

definition of "agriculture" found in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(f), in construing the term "agricultural laborer." Section 3(f) of the FLSA provides:

> "Agriculture" includes farming in all its branches…and any practices…performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Under this definition, "agriculture" has both a primary and secondary meaning.[7] The primary meaning refers to actual farming operations, that is, those functions normally associated with farming such as cultivation, tilling, growing, and harvesting of agricultural commodities. The secondary meaning includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.[8]

Clearly, based on these definitions and the record as a whole, neither of the two individuals the Employer seeks to exclude from the historical bargaining unit are engaged in primary agricultural activities. Thus, it is undisputed that neither Richard Castellanos nor Hilda Arellano are engaged in the cultivation, tilling, growing or harvesting of any agricultural commodity, such as seed or tomatoes. In fact, neither of these individuals has ever worked on the Employer's research farm or in its green houses.

Thus, the only issue is whether either Castellanos or Arellano are engaged in secondary agriculture in performing their work in the seed room.[9] As set forth above,

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[7] See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949).

[8] Id. See also Department of Labor Regulations Sec. 780.105, 29 CFR Sec. 780.105 (2002)

[9] It appears that the extraction of the tomato seeds post harvest would not be considered by FLSA to be harvesting and part of primary agriculture. See 29 CFR780.118 (2002). However, the extraction of the

secondary agricultural work includes any practices that are performed by a farmer or on a farm as an incident to or in conjunction with such primary farming operations. In *Camsco*, 297 NLRB 905 (1990), the Board found that operations such as sorting and grading and packing of agricultural products fall within the definition of secondary agricultural work only if this work is performed exclusively on agricultural products produced on the processor's own farms. Since a small amount of the mushrooms processed on the employer's farm in *Camsco* came from other producers, the processors were found not to be agricultural laborers.[10]

As described above, neither Castellanos nor Arellano process seed that is grown on a farm owned or operated by the Employer. Instead, they both process only seed that is produced overseas by farmers who have a contractual relationship with the Employer. Thus, their work is not incidental to or in conjunction with the Employer's primary farming operations, which are concluded once a commercially marketable seed variation is developed, and the two, are therefore, not engaged in secondary agricultural work.

The Employer argues, however, that the overseas contract farms are so integrated into its operations and so much under its control that they are essentially one with the Employer, so that processing of the bulk seed is indeed incidental to and in conjunction with the Employer's farming operations. However, the U.S. Supreme Court has considered this argument and rejected it. In *Bayside Enterprises, Inc. v. NLRB,*[11] the Court upheld the Board's decision that the activity on a contract farm should not be

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seed on the farm by farmers, as is the case with the overseas farmers, is definitely incidental to the primary farming and is, at least, secondary agriculture under the FLSA. Id.

[10] In *AgriGeneral*, 325 NLRB 972 (1998), the Board affirmed its holding in *Camsco*. The Board's decisions in *Camsco* and *AgriGeneral* are fully consistent with the Department of Labor's Regulations. For example, see 29 C.F.R. Sec. 780.137 and Sec. 780.141.

[11] 429 U.S. 298, 97 S.Ct. 576, 94 LRRM 2199 (1977).

regarded as the agricultural activity of integrated entity such as the Employer. In that case, the employer operated a large, vertically integrated poultry business but contracted out to independent farmers the raising of chicks, which were hatched in the employer's hatcheries. The employer supplied the contracting farms with not only the one-day old hatchlings but also their feed and medicine and other supplies. The employer retained title to the chicks at all times and paid the farmers a guaranteed sum plus a bonus based on poultry weight. After nine weeks the employers employees picked up the chicks and returned them to the employer's farm for slaughter and processing. The group of employees in question in that case was the truck drivers that delivered the chicks to the farmers and picked them up nine weeks later. In sustaining the Board's order that the truck drivers were not engaged in secondary agricultural, the Court stated that, "Since the status of the drivers is determined by the character of the work which they perform for their own employer, the work of the contract farmer cannot make the drivers agricultural laborers." Id at 303 Thus, even though the employer furnished the contractors with virtually everything they needed to raise the chicks for nine weeks, the Court was unwilling to treat the contract farmers as part of the employer's vertically integrated enterprise. Instead, the Court sustained the Board's holding that the farmers were not part of employer's farming operations and the truck drivers were not agricultural employees even if their work was incidental to the contractors' farming operations. In view of the Court's decision I reject the Employer's argument that I treat its contract farmers as if they were owned by the Employer. In this regard, I note that the Employer's control over its overseas farmers is far less than that exercised by the employer in *Bayside*.[12]

[12] The Court's decision in *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 152 LRRM 2001 (1996) relies

In its post-hearing brief, the Employer raises for the first time the contention that that the historical bargaining unit should be clarified to exclude Castellanos and Arellano not only because they are agricultural workers but also because these individuals lack a sufficient community of interest with the rest of the unit employees. By raising this issue for the first time in brief, the Employer has created a serious due process problem because the Union has been denied the opportunity to adduce evidence on the issue at hearing and to argue the issue in brief. However, I need not resolve the procedural issue because this argument is untimely under well established Board law. In that regard, the Board refuses to clarify a unit mid-contract when the objective is merely to change the composition of the contractually agreed upon unit by the exclusion or inclusion of employees. To grant the Employer's petition at such a time would be disruptive of a bargaining relationship voluntarily entered into when it executed the Agreement.[13] There is no question that Castellanos and Arellano perform work which has been covered by the Agreement for decades. Thus, it would be inappropriate to clarify the unit midterm based on this new argument.

Moreover, even if this contention was not untimely, it would not be a sufficient basis to justify clarifying the historical unit. A unit clarification proceeding is appropriate for determining the unit placement of employees whose positions fall "within a newly established classification of disputed unit placement or within an existing classification which has undergone recent, substantial changes in duties and responsibilities of the

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on its analysis in *Bayside* in reaching a similar conclusion about the relationship between a vertically integrated enterprise and its contract farmers. In its brief, the Employer argues that the application of *Holly Farms* to the facts in this case would be unreasonable and suggests that I should not follow the Court's ruling in that case but instead rely on the analysis in Justice O'Connor's dissent. However, I am bound by the rulings of both the Board and the Court.

[13]. *Edison Sault Electric Co*., 313 NLRB 753 (1994); *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977); *San Jose Mercury News & San Jose News*, 200 NLRB 105 (1973); *Credit Union National Assn.*, 199 NLRB 682 (1972); *Wallace-Murray Corp*., 192 NLRB 1090 (1971).

employees in it so as to create a real doubt" about whether the employees belong in the unit. *Bethlehem Steel Corp*., supra, citing *Union Electric Co*., 217 NLRB 666, 667 (1975). The undisputed evidence establishes that Castellanos and Arellano continue to perform the same job functions and duties in the seed room that have been performed by seed room employees for many years. The only change that has occurred is that since the elimination of the fresh tomato processing operation at the facility in about 2002, the seed room employees do not perform seasonal work in the factory, and thus, have less physical contact with factory employees. However, there continues to be some contact and interaction between seed room employees and other unit employees. In this regard, at least until about July 2005, Castellanos continued to perform overtime work on weekends in the factory and since at least October 2005, factory employee John Machado has worked one full day a week as well as overtime in the seed room. In addition, Arellano was transferred to the seed from the factory on or about September 1, 2005.[14] In *Bethlehem Steel*, supra, the Board found that the mere change in the amount of contact between the classification in question and the rest of the bargaining unit did not constitute recent substantial change warranting a unit clarification. Supra at 244. Thus, the Employer's contention that the unit should be clarified on the basis of community of interest would not justify a unit clarification regardless of when in the bargaining cycle the petition was filed.

[14] Also, it is doubtful that this change in the amount of contact between the seed room and factory employees could be considered "recent" because it was primarily the result of a change in the Employer's operations that took place sometime in 2002.

In its brief, the Employer also raises for the first time the contention that Castellanos should also be excluded from the unit as a statutory supervisor.[15] Here again, I do not need to resolve the due process issue because the argument is inappropriate on other grounds as well. In that regard, the party asserting that an individual is a supervisor under the Act bears the burden of proving the person's supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861 (2001); *Bennett Industries*, 313 NLRB 1363 (1994); *Tucson Gas and Electric Co.*, 241 NLRB 181 (1979). Here, the Employer has failed to establish that Castellanos is a statutory supervisor. In this regard, the only evidence adduced by the Employer at the hearing on this issue was a copy of the job description of a position that Castellanos first accepted and than rejected in September 2005. The Board has long held that "theoretical [or] paper power will not suffice to make an individual a supervisor." *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999). Moreover, the Board has held that no weight will be given to a job description that attributes supervisory authority where there is no independent evidence of its possession or exercise. *Chevron U.S.A., Inc.*, 309 NLRB 59, 69 (1992), and cases cited therein. Here, it is undisputed that Castellanos is not exercising any of this "supervisory" authority set forth in the above-mentioned job description. In fact, the Employer's primary witness testified that Castellanos is not currently performing any supervisory duties and continues to perform the unit duties that he has always performed in the seed room, that is, the sorting, washing and drying, milling and packaging of the seed. In these circumstances, I find

[15] The same due process problem arises with this contention as with the Employer's community of interest argument because the Union was not given an opportunity to present evidence on or to brief this issue.

that the Employer has not established that Castellanos is a statutory supervisor, and it would, therefore, be inappropriate for me to clarify the unit on this basis.

In view of the above and the record as a whole, I will not clarify the existing bargaining unit to exclude Richard Castellanos or Hilda Arellano.

CONCLUSIONS AND FINDINGS

1. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned, The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a Delaware corporation with an office and place of business in Stockton, California, where it is engaged in the processing and manufacture of food products. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purpose of the Act assert jurisdiction herein.

3. The parties stipulated and I find that the union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Employer petitioned to clarify the existing bargaining unit to exclude employees Richard Castellanos and Hilda Arellano on the basis that they are agricultural employees within the meaning of the Act.

5. I find that Richard Castellanos and Hilda Arellano shall not be excluded from the unit.

ORDER

The petition to clarify the unit is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by the Board in Washington by 5 P.M., March 9, 2006. The request may **not** be filed by facsimile.

DATED AT Oakland, California, this 23rd day of February, 2006.

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